No. 12,496

In the

United States Circuit Court of Appeals

For the Ninth Circuit

OSCAR R. EWING, Federal Security Administrator,

Appellant,

vs.

MARY R. BAIOCCHI,

Appellee.

BRIEF FOR APPELLEE AND APPENDIX

On Appeal from the Order of the United States District Court for the Northern District of California, Southern Division.

ARTHUR L. JOHNSON,

202 Porter Building, San Jose, California

Attorney for Appellee.

Of Counsel:

ROBERT MORGAN of

JOHNSON, MORGAN, THORNE & SPEED

202 Porter Building, San Jose, California

GRAPHIC ARTS PRESS, 19 N. SECOND ST., SAN JOSE, CALIFORNIA

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

PAGE

Cases

PAGE

Texts and Articles

Statutes

Rules and Regulations

Social Security Administration Decisions

No. 12,496

In the

United States Circuit Court of Appeals

For the Ninth Circuit

OSCAR R. EWING, Federal Security Administrator,

Appellant,

vs.

MARY R. BAIOCCHI,

Appellee.

BRIEF FOR APPELLEE AND APPENDIX

On Appeal from the Order of the United States District Court for the Northern District of California, Southern Division.

SUBSTANTIAL AGREEMENT ON FACTS.

The appellee is in substantial agreement with the appellant on the facts as presented in the record and in the appellant's statement of the case.

QUESTION IS ONE OF LAW.

The question before the Court is one of law and on the point at issue, to-wit, whether or not employees of a cooperative commercial packer of dried fruit are entitled to the protection and coverage of the Social Security Act, under the 1939 Amendment thereto,

the appellee is in complete disagreement with the appellant.

HISTORY OF THE CASE.

In fact, the writer of this brief has been litigating the matter of the coverage of dried fruit packing house workers with the Government in the Federal Courts for the last five years and has been at least partially responsible for securing five decisions favoring coverage of all such dried fruit packing house workers from six judges in three test cases brought on behalf of such employees.

These five decisions and the six judges who rendered them are listed, for the convenience of this Court, as follows:

1. *Bettencourt v. Social Security Board* District Court, Northern District of California, 1947) 66 Fed. Supp. 629 — Goodman
2. *Burger v. Social Security Board,* (District Court, Southern District of California, 1947) 66 Fed. Supp 619 — Mathes
3. *Miller v. Bettencourt,* (Circuit Court of Appeals, 9th Circuit 1947) 161 Fed. (2d) 995 — Bone, Stevens, Healy
4. *Miller v. Burger,* (Circuit Court of Appeals, 9th Circuit, 1947) 161 Fed. (2nd) 992 — Bone, Stevens, Healy
5. *Baiocchi v. Ewing,* (District Court, Northern District of California, Dec. 8, 1949), No. 28187H, 87 Fed. Supp. 520 — Harris

In all of these cases the writer appeared either as counsel or as *amicus curiae,* being counsel in the *Bettencourt* and *Eaiocchi* cases and appearing as *amicus curiae* in the *Burger* case.

In none of the decisions was anything said which would indicate that the employees of a cooperative commercial packer were to be treated in any manner different from the employees of the ordinary commercial packers who compete with each other in the same industry. It was assumed that they were all to be treated alike, and four of the decisions so indicated directly.

Moreover, the Social Security Administration itself, has repeatedly held that no distinction should be made between these competitive concerns.

We start out with the generalization on February 6, 1945, of Hon. Arthur J. Altmeyer, Chairman, Social Security Agency, approved by Hon. Robert F. Wagner, then U. S. Senator, known as the "Father of Social Security," to the effect that it was, at that time, before any of the above-listed Court decisions were rendered "*by no means certain that dried-fruit workers are now excluded.*" (R. 55, which opinions were, through a printer's error doubtless, not printed in the record, although designated for printing by the U. S. Attorney. See R. 76. For the Court's reference, the letters appear in the Appendix to this brief).

Next we have the decisions of the Appeals Council, Social Security Administration, in the cases of Edgar

T. Penn (554-03-8307) and Marguerite K. Grimley (554-05-7972), decided July 15, 1947, and July 16, 1947, respectively, to the effect that it was "abundantly clear" from the decisions of the Circuit Court of Appeals in the *Bettencourt* and *Burger* cases that the employees of cooperative in the dried fruit packing house field were in covered employment. (R. 104, 168, 169, and Appendix to this brief, pp. xxii, xxvi).

On the basis of these decisions, the Government actually paid benefits for many months to Mr. Penn and Mrs. Grimley, fellow employees of Mr. Baiocchi, based on their earnings from the California Prune and Apricot Growers Association, the cooperative here involved.

When the Commissioner of Internal Revenue refused to go along with the Social Security Aministration in its interpretation of this Court's decisions in the *Bettencourt* and *Burger* test cases (in spite of the fact that he had, for 11 long years, collected social security taxes from the cooperative and all its employees, including Penn, Mrs. Grimley and Baiocchi), it was realized that the only way the matter could get into Court again was a denial of benefits in a new test case. So such a new case was brought up by the writer on behalf of Mr. Baiocchi's widow and her two minor children. Mrs. Grimley and Mr. Penn were force to return the payments they had received to the Government. The bitterness engendered in Edgar Penn's mind thereby undoubtedly contributed to his suicide shortly thereafter. As will be seen, the wel-

fare of thousands of California workers rests upon the decision of this case.

After the *pro forma* decision of the Social Security Administration for the purposes of a test case, an exhaustive hearing was held at San Jose by the Referee. His decision was a formal one, not on the evidence, which was all in favor of coverage, but as follows:

> "The Social Security Administration *has determined* that the principles enunciated in the *Burger* case, *(supra)*, do not establish a basis for a finding that an individual rendering processing services for a cooperative association is engaged in 'employment' within the contemplation of the Social Security Act, as amended. *The position taken by the Administration* is to the effect that . . ." (Emphasis added). (R. 100).

When the learned Judge Harris approved the Administration's original decision to the effect that it was "abundantly clear" that the more than 2,000 employees involved were covered, it was felt that this decision would surely end the five years of litigation of this matter. The Commissioner of Internal Revenue, however, insisted on an appeal. The Social Security Adminstration and its Commissioner, Hon. Arthur J. Altmeyer, have expressed themselves to the effect that the Federal Security Agency would recommend to the Department of Justice that this appeal be dismissed if the Bureau of Internal Revenue would acquiesce in the decision. Hon. Alanson W. Willcox, General Counsel for the Federal Security Agency, also so advised the

writer of this brief. The Bureau of Internal Revenue would not acquiesce however and the Attorney General, therefore, felt duty bound to present the matter to this Honorable Court, doubtless to obtain a more authoritative decision than a District Court decision pertaining solely to the employees of a cooperative.

THE MERITS OF THE CASE.

From reading the appellant's brief one would hardly get the idea that the above true facts prevail. Written in Washington, doubtless by exponents of those who originally were responsible for the Internal Revenue Bureau's rulings which this Honorable Court set aside in the *Bettencourt* and *Burger* cases, the brief constitutes either a confused distortion of the entire situation or shows a cold-hearted desire to sacrifice human rights (paid for in this case) on the altar of subtle, technical distinctions and legal refinements. Occasionally, however, even the appellant must concede the impossibility of his position. (See p. 20, where appellant says his position is anomalous).

POINT I.

LEGISLATIVE INTENT.

Harking back to the legislative intent, which four Federal Courts have already construed contrary to the appellant in the five decisions listed above, the writers of the appellant's brief seek to give the impression that Congress intended to restrict coverage

of the Social Security Act by the 1939 Amendment here in question. This is positively not the case. There was no such desire whatsoever. The whole history of the legislation as set forth in the Appendix hereto shows this conclusively. The desire was to supplement, improve and increase coverage.

The writer of this brief happened to have been in Washington at the time the 1939 Amendment was passed. In fact, he was there for seven years from 1936 to 1943, directing the activities of a Steering Committee of 150 Congressmen interested in the extension of the coverage of the Social Security Act, attended every session of the hearings of the House Ways and Means Committee during the two months it considered the various 1939 Amendments, and testified for three days before the House Committee and before the Senate Finance Committee, heard all the debates there and on the floor of the House and Senate.

Not once during this whole period was there any mention made of the possibility that commercial packing house workers, even those employed by the cooperatives in this field, might be considered excluded. Had there been, the matter would certainly have caused extensive debate and opposition from the members of the Steering Committee with which the writer of this brief was working.

As it was, the main phrase which the Congressmen used in connection with the Amendment and which stood out in the minds of all was the phrase, "*as such*

services are an integral part of farming activities." The appellant's own brief, on page 16, cites this basic test for "agricultural work" in the Committee Report which he quotes. It cites further, on pages 16 and 17, another Committee Report to the effect that the same rule applies to a "farmer, a farmers' cooperative, or a commercial handler of such commodities," which rule, as set forth by Congressman Buck on page 30 of appellant's brief, is "*the nature of the work and not by whom the man is employed.*" (See Appendix of this brief for more detailed excerpts from Congressman Buck's speech).

If these basic rules, set forth in the appellant's own brief, are thoroughly understood, there should be no difficulty about this case.

The main difficulty which the Government has faced in dealing with this problem has been the early fundamental error of the Bureau of Internal Revenue of attempting to apply to dried fruit packing house workers the *general* test for agricultural commodities found in Paragraph (4), to wit, the test of whether or not the work was "incident to ordinary farming operations," applicable, for instance, to grain cases, instead of the two specific statutory tests found in the last part of this paragraph for "fruits and vegetables," to-wit (1) whether or not the work was incident to the preparation of such fruits or vegetables for *market or* (2) whether or not the work was performed after delivery "to a *terminal market* for distribution for consumption."

Even under the "incident to ordinary farming operations," rule the Bureau of Internal Revenue could not, in fact, justify its position, but it has stuck to it stubbornly through ten years of intra-departmental squabbles with the Social Security Amdinistration and five years of Federal Court litigation with the writer in which the Bureau has gained no solace from any of the five decisions rendered. To completely ignore the two specific statutory tests for employees working with "fruits and vegetables," under these circumstances, especially when the second highest Court in the land has ordered them applied, is unbecoming of a Federal agency which is part of an ordinarily humane government. Yet here we are in that same high Court for the second time on the same issue, to-wit, whether or not these two basic tests must be applied to *all* workers in the same field when the statute says they must be so applied.

POINT II.

THE DECISION THAT THE DECEASED'S SERVICES WERE AGRICULTURAL LABOR BY THE ADMINISTRATOR WAS ERROR AS A MATTER OF LAW AND PROPERLY REVERSED BY THE DISTRICT COURT.

The decision of the lower Court granting the motion for a summary judgment and reversing the appellant's decision as a matter of law was correct.

As it has already been pointed out, the appellant

has seriously confused and misapplied the legislative history and intent of the 1939 amendment and definition of "agricultural labor." In spite of all of the express legislative history, of committee report after committee report, of the statute itself, and of the regulations thereunder, which point to the simple fact that the test is the "nature of the work and not by whom the man is employed," (see appellant's brief at page 15), the appellant devotes almost all of the argument to trying to destroy this simple test set forth by him. For example, the appellant argues that the case of *Miller v. Burger*, 161 F. (2d) 992 (9th Cir.), and the companion case of *Miller v. Bettencourt*, 161 F. (2d) 995 (9th Cir.) are distinguishable from the case at the bar because the California Prune and Apricot Growers Association here involved is a non-profit corporation and because Rosenberg Bros. involved in the *Burger* and *Bettencourt* cases was a profit organization.

If, as the appellant argues in the first half of his brief, the test of "agricultural labor" as defined in the act is the "*nature of the work and not by whom the man is employed,*" why do we look to see by whom the man is employed—cooperative or profit conporation? It is this confusion that has kept the appellant vascillating for eleven years from the extremes of coverages to non-coverage.

Since the appellant claims the test is the "*nature of the work* and not by whom the man is employed," let us apply that simple test as stated by Congress-

man Buck, the legislative reports, the statute and the *Burger* and *Bettencourt* Court cases.

The Referee who heard the matter and decided it, stated in his opinion (R. 99):

> "From the evidence in this record it appears that the association performs its functions and handles its produce substantially identical to the manner and methods utilized by Rosenberg Brothers, a commercial packer. Rosenberg Brothers was the employer involved in the case of *Miller v. Burger*, 161 Fed. 2d. 992, in which case it was held that a processor of dried fruit was not engaged in agricultural labor."

If this is so, and there is no dispute, *if the nature of the work is identical*, then the result must be identical. If Burger, in the *Burger* case, did the same kind of work as Baiocchi did in the case at bar and the nature of the work is the test of coverage, then clearly, Baiocchi performed services in covered employment within the meaning of the act.

Another clear inconsistency in the appellant's argument is his assertion that the definition of "agricultural labor" was enacted to relieve the member of a cooperative non-profit corporation of the tax burden which allegedly was not placed on the large farmer. To state that any large farmer in the State of California performs any of the functions of the California Prune and Apricot Growers Association is to make a statement in derogation of the record. (See R. 96). Apparently, the stockholders of the twenty-eight non-profit corporations that control the California Prune

and Apricot Growers Association are not worried about any tax exemption since the corporation, as a matter of record, has contributed since 1936. The amazing thing about this alleged intent, as appellant applies it, is that instead of preventing inequality of tax burden by the appellant's position, he is creating a new type of inequality, namely, between the small farmer who sells to the cooperative non-profit corporation, such as the California Prune and Apricot Growers Association, and the small farmer who sells to the profit corporation, such as Rosenberg Bros. This apparently is of no concern to the appellant as he blandly argues for equality of tax burden or else he deliberately ignores it. Whether tax equality for activities of cooperatives was intended becomes less certain when we realize that all of the secretarial and clerical help for this cooperative is covered and also that, even in the case at bar, the deceased was credited for five quarters of coverage after 1939, when working for this cooperative performing maintenance work. If Congressional intent was to relieve members of cooperatives of any tax burden, as appellant states, why were they not given a blanket exemption for all employees of the cooperative? The fact is that Congress considered exempting cooperatives as such in 1939 and decided against it, exempting only such employees as earned *less* than $45.00 a quarter (42 USC 409 (b) (10) A (i). Thus we return again to the true congressional intent, namely, to make the test *the nature of the work* and *not* by whom the worker

is employed. This point, however, does show the inevitable inequality that results when we apply that rule to the profit corporation and refuse to apply it to the non-profit corporation.

The appellant's position in this matter is not only in violation of the intent of Congressman Buck, the legislative reports and the statute, but also in violation of the leading and recent *Burger* and *Bettencourt* cases, *supra.*

It is the appellee's contention that the *Burger* and *Bettencourt* cases establish that the employees of a terminal market or of a growers' market are not in agricultural labor, but are performing sevices within covered "employment" under the Social Security Act, as amended, regardless of the business structure of the organization that is the "market" or "terminal market." This used to be the Administration's attitude, also. (See attached Appendix, p. xix, for ruling before 1940 that the workers are employed by the Association and *not* by the producer members thereof, a ruling in which the *Bureau of Internal Revenue* acquiesced *at that time.* See, also, Appendix, pp. xxii-xxvi, for rulings in *Penn* and *Grimley* cases).

This is the square holding in the *Burger* case, in 66 Fed. Supp. 619 at p. 624, wherein Judge Mathes held:

> "Services performed in treating and handling an agricultural commodity after delivery to a terminal market for distribution for consumption unquestionably do not constitute an integral part of farming activities. And it is clear from the last sentence of paragraph (4) of the legislative

> definition that Congress did not intend to exempt such services as agricultural labor, *even when performed for the account of the producer or grower*" (Emphasis added).
>
> "This legislative intent is unambiguously expressed.
>
> "Delivery to a terminal market for distribution for consumption is fixed by statute as a definitive boundary. Thus Congress has drawn a line of demarcation across the various pathways followed by agricultural and horticultural commodities in passing from producer to consumer, and has declared that once the commodity reaches the market, from which in ordinary course of trade it next goes into the channels of distribution, any service afterwards performed for any person in treating or handling such commodity does not constitute 'agricultural labor' within the meaning of the act."

The *Burger* case was affirmed on appeal by the Ninth Circuit on June 5, 1947, in 161 F. 2d 992 and is the law of this circuit.

The *Burger* case also establishes the rule without question that by the term "market," Congress means the grower's market. Up until the "grower's market" is reached, services performed by anyone or any type of business association for the account of the grower or producer is exempt as being "agricultural labor." But as is stated in the *Burger* case, 66 F. Supp. 619 at p. 626:

> "Beyond that point—beyond the normal market of the producer or grower—the commodity must bear the burden of the taxes *regardless of who owns it.*" (Emphasis added).

There could be no clearer exposition of the law.

The companion case of *Bettencourt v. Social Security Board*, 66 Fed. Supp. 629, was similarly treated except that Judge Goodman did not feel it essential to determine that the word "market" as used in 42 U. S. C. A. 409 (1) meant "grower's market."

Both the *Burger* and *Bettencourt* cases were appealed by the Social Security Administration and were affirmed in 161 F. 2d. 992, and 161 F. 2nd 995, respectively. In the *Burger* case, Judge Bone, speaking for the Court, held that the Rosenberg Bros. plant was a "terminal market" and a "market" (held to properly mean a "grower's market") and the decision of Judge Mathes was affirmed. The *Bettencourt* case was, likewise, affirmed.

One of the findings of fact by the referee in the case at bar was that the Central Sales Agency operated in an identical manner to the Rosenberg Bros. plant. The conclusion is thus inescapable that the administration's decision is wrong as a matter of law and must be reversed.

The fact that Baiocchi worked for a non-profit corporation and Burger worked for a profit corporation is unimportant as is seen in many cases, one of the clearest of which is the recent decision of *California Employment Commission v. Butte County etc. Assn.*, 25 Cal. 2d 624, 154 P. 2d 892. Speaking of a corporation organized under the same law as the Central Sales Agency and Locals involved therein, the Court therein at p. 636 and 637 said:

"The nature of the defendant's corporate structure is immaterial for 'cooperative corporations are just as distinct an entity as are other private corporations.' (*Fletcher's Cyclopedia of Corporations* (perm. ed.) Vol. 1 No. 25, p. 90). The doctrine of separate entity will be disregarded only to prevent fraud or grave injustice * * * Obviously no such reason exists here for ignoring the plain language of the effective administrative definition—but, on the contrary, to treat the defendant corporation nevertheless as the *alter ego* of the individual farmer members *would, in fact, promote injustice* by unnecessarily restricting the operative scope of the unemployment law of this state, a limitation wholly out of line with the beneficient purpose of such legislation that, consistent with its terms, the coverage provisions have a broad application." (Emphasis by Court).

See also in this respect

Cowiche Growers, Inc. v. Bates (1941), 10 Wn. 2d. 585, 117 P. 2d, 624;

Employment Security Commission v. Arizona Citrus Growers (1944), 61 Ariz. 96, 144 P. 2d 682;

H. Duys and Co. v. Tone, 125 Conn. 500, 5A. 2d. 23;

Maryland and Virginia Milk Producers Assn. Inc. v. District of Columbia, 73 App. D. C. 399, 119 F. 2d. 787.

Actually, the fact that Baiocchi worked for a non-profit corporation makes the case even stronger than if he had worked for a profit corporation.

Look to the plain words of the statute. Employment is defined in Section 209 (b) broadly as all services, of whatever nature. There are definite exceptions,

however. Exception 10 (B) of Section 209 (b) excepts service performed in employ of an agricultural organization exempt under 101 (1) of the I. R. C. That that is not this case is shown by T. D. Reg. 111-Sec. 29 101 (1)-1 which explains that exception as applying to organizations which "(1) Have no net income inuring to the benefit of any member; (2) Are educational or instructive in character; and * * *"

That is obviously not the Central Sales Agency. It does have "net income inuring to the benefit of" all of its members and isn't educational or instructive in character. (R. 166).

The Central Sales Agency, however, is excepted by sub-section 10 (A) of Section 209 (b) of the Social Security Act as to services not exceeding $45.00 per quarter. It is exempt from corporate income taxation and has been granted an exemption under the provisions of Internal Revenue Code 101 (12) (See R. 166). The statute, Section 209 (b) 10 (A) (Social Security Act) is plain that employment, as defined therein, includes services rendered a corporation exempt under any subsection of I. R. C. 101 (except I. R. C. 101 (1)) if the remuneration exceeds $45.00 per quarter.

The wording of the amendment to the Social Security Act in 1939 is plain. "Farmers, fruit growers, or other like associations organized and operated (a) for the purpose of marketing the products of their members or other producers" (I. R. C. 101 (12)) employing workers who earn wages in excess of

$45.00 are thus employing employees earning wages in covered employment, within the definition of the Social Security Act. The plain words of this 1939 amendment to 209 (b) show conclusively without doubt that the meaning of the 1939 amendment to 209 (b) was as interpreted in the *Burger* and *Bettencourt* cases and that the widow of Almando Baiocchi and his minor children are entitled to their benefits under the Social Security as a matter of law. The position of the Social Security Administration is absolutely without support and not only is wrong as a matter of law, but also has been manifestly unjust to her, in that she, Mrs. Baiocchi, a widow, has been compelled to wait over a period of three and one-half years for her benefits and for the benefits of her children and obtain the services of counsel to sue and to defend an appeal in this Court for benefits that are hers unquestionably, as a matter of law.

The appellant, in his specification of errors, No. 8, complains that the District Court erred in disregarding the appellant's finding and finding independently and without support in the record that when the locals turned dried fruit over to the California Prune and Apricot Growers Association it is in merchantable state, and payment of the purchase price is then fixed, although postponed. With respect to this complaint, we need only to refer to the opinion of the Referee which appears on page 98 of the Transcript of Record. The Referee's opinion at page 98 states:

> "No dehydration process whatsoever is performed by the Association. When the produce is brought by the grower in dehydrated form to the Association and after it has been weighed, it is first tested to determine its perishability. If the produce does not meet the standards of the Association in this regard, it is rejected by the Association. Upon acceptance by the Association it is placed in bins after it has been graded and remains in those bins until it is ready to be packed. Before packing the produce is sterilized and with the exception of the actual packing operation that is the only process performed on the fruit by the Association."

Also of interest in this respect is page 178 through 180 of the Transcript of Record, paragraph 3 (d), as it appears at page 178, requires all prunes to be delivered in a properly dried and merchantable condition.

Paragraph 3, as it appears at page 179, requires any local delivering to the California Prune and Apricot Growers Association to deliver the dried fruits in a properly dried and merchantable condition. Since this specification of alleged error is so clearly wrong and the finding by the District Court is sustained by the opinion of the Referee and the Transcript in question, and further, since the appellant does not attempt to develop in his argument this specification of error whatsoever, it is felt that no further treatment of this specification is necessary.

As to the claim that the purchase price is not fixed, the opinion of the Referee (See R. 96-97) clearly re-

futes any such claim, as does the testimony on the original hearing as set out at pages 153 and 154 of the Transcript of Record. Since this specification is also abandoned by the appellant and not argued, it is felt that no further authority is needed.

In specification of error No. 11, the appellant asserts that the District Court should have found that the California Prune & Apricot Growers Association was an agent rather than buyer, and that all of its services were for the account of the growers. The statement that the California Prune & Apricot Growers Association is an agent or trustee of the members of its local non-profit corporations is about as accurate as to state that legally a bailee is a trustee for the bailor, a creditor is an agent of the debtor, or a person with a power of appointment is an agent of the beneficiary.

The writer of this brief has no quarrel with the statement that a fiduciary relation exists *which requires the association to account to grower members for the proceeds* received by it for the sale of fruit delivered to it, but it is certainly not an agent or trustee for them *in any respect at all.* Does the grower have the power to *control* the detailed operation of the association? Does the grower have the *power of termination* of the agency? Does the Association contract as agent for its members? Can an agent sue its principal for liquidated damages, an injunction or specific performance? The answer is, of course, nega-

tive in all of these respects. Where then are the attributes of an agency?

The appellant must be aware of the basic facts of cooperative marketing. See, for example, 15 Cal. L. Rev., at p. 88, in which it is stated:

> "The marketing agreements of co-operative marketing associations are of two general types, the agency type and the purchase and sale type . . . By the purchase and sale type of contract the grower agrees to sell and the association to buy the grower's crop. This type of contract constitutes an executory agreement for the sale of the crop to the association[6], and title of the crop passes to the association upon delivery, unless otherwise provided[7]."

See, also, the *Law of Cooperative Marketing*, Evans and Stokdyk, 1937, Lawyers Coop. Publ. Company, at p. 145, in which it is said:

> "An examination of marketing contracts in use in various jurisdictions will disclose many points of resemblance. In one particular, however, namely in the selection of terms to express the covenant by which the member agrees to market his product through the association, two distinct formulas are noticeable—one, 'The grower hereby appoints the association his sole agent,' the other, 'The association agrees to purchase and the grower agrees to sell and deliver,' or 'The association buys and the grower sells and agrees to deliver'."

The Transcript of Record at page 178 and page 179 reads respectively as follows:

> "Local agrees to buy and the Grower agrees to sell and deliver to the Local . . ." (R., p. 178).

> "The Central Sales Agency agrees to buy and the Local agrees to sell and deliver to the Central Sales Agency . . ." (R., p. 179).

How then can the defendant advise this Honorable Court that under the law the relationship between Association and the member of a local is one of principal-agent or trustee-beneficiary? There is obviously a sale and transfer of absolute title.

There is no dispute that the California Prune & Apricot Growers Association has absolute title to the fruit, can dispose of it as it wishes, can mortgage it, can commingle it, and that the risk of loss is on the California Prune & Apricot Growers Association and not on the grower of the particular fruit which might be destroyed. What other attributes of legal ownership are there? The appellant is in error when he states the California Prune & Apricot Growers Association holds only naked legal title as an agent or trustee.

The appellant, however, seems to abandon this specification of error in that in his argument he does not devote any substantial space to an assertion that this non-profit corporation, the California Prune & Apricot Growers Association, being a corporation twice removed from the grower, is an agent or does work as an agent for the account of the grower. Clearly, to do so would be to defy established rules of corporation law with respect to corporation identity and the established law of this Circuit with respect to preserving the corporation identity in such a situation.

There is no conflict of fact in the case at bar. The facts are clear and obvious and are as reported by the referee. There is no controversy of mixed law and fact. The whole case rests upon a question of law; namely, whether the deceased employee, Almando Baiocchi, performed "agricultural labor" within the meaning of the Act as quoted heretofore. This, it is submitted, is a pure question of law which must be determined by this Honorable Court.

In *Carroll v. Social Security Board*, 148 F. 2d 679, the Seventh Circuit, when faced with a similar problem, commented:

> "Moreover in our view, the rule (that the Court is bound by the findings of the Board) has no application, because the question presents an issue of law rather than fact. It involves a construction of the act."

In such a manner, Circuit Judge Bone of the Ninth Circuit, also, in an identical case to the case at bar, commented in the case of *Miller v. Burger, supra*:

> "While the findings of fact of the Social Security Board are supported by the evidence, we think its decision was incorrect when measured off against the language of the Act and the intent of Congress in adopting the 1939 amendment thereto. The District Court was justified in reversing the decision of the Board . . ."

In the sister case of *Miller v. Bettencourt, supra*, the same Judge commented at p. 996:

> "This being true, as a matter of law, the labor of appellee in the Rosenberg plant was not 'agricultural labor' . . ."

for consumption, the statute states that the services of workers thereafter are in covered employment regardless of who owns the product, be he one farmer, two farmers in a partnership, or five thousand farmers owning stock in either a profit or a non-profit marketing corporation.

As is stated in the *Burger* case, 66 F. Supp. 619 at p. 626:

> "Beyond that point—beyond the normal market of the producer or grower—the commodity must bear the burden of the taxes *regardless of who owns it.*" (Emphasis added).

Clearly, the authorities set out herein above show that we do not pierce the corporate fiction of a non-profit corporation any more than that of a profit corporation in the absence of traditional rules with respect to fraud; but, even if we did, the *Burger* case, *supra*, and the legislative intent as declared by appellant would compel the same result, namely, coverage for the deceased and affirmance of the lower Court.

What then is the appellant attempting to do? Is he attempting to overrule the *Burger* case, *supra*, by reading "cooperative" into the statute? The word "cooperatives" is not once used in Title II of the Social Security Act (except by indirect reference to the I. R. C.). It is not even mentioned in 42 U. S. C. A. 409 (1), the section which defines "agricultural labor." Is the Administration attempting to legislate a new exception to coverage under the Social Security Act?

Neither Congress nor the Courts have ever attempted to distinguish between work rendered for corporations (profit or non-profit) in defining agricultural labor. The test of "agricultural labor" has always been to the legislature, judiciary, and citizenry a question of the type of work done.

Since the nature of the work is the same in the case at bar as in the *Burger* and *Bettencourt* cases, and the chain of commerce identical between grower and consumer, how can the appellant justify his position? The commercial plants being almost identical and the nature of the work the same, how can the appellant justify his position and this appeal? He attempts to do so by the mere assertion that a cooperative non-profit organization cannot be a market, neither a "grower's" market or a terminal market for distribution for consumption and, as for the latter, he suggests that we do not have to have one. This argument blindly ignores the facts and the law of the situation.

The facts are that each grower has a contract with a Local non-profit corporation and that each of the twenty-eight Locals has a contract with the Central Sales Agency, the California Prune & Apricot Growers Association, which contract provides for liquidated damages and which, under the law of this state, may be enforced by injunction or specific performance. Dried fruit is produced by the farmers who grow it. The farmer picks the fruit, sulphurs it, dries or dehydrates it or hires others to perform the above ser-

vices and then delivers it in the dried manufactured form to the growers' market, which in this case is the Central Sales Agency. The dried fruit is transported to the Local by the grower and there title passes to the Local if the goods are in a deliverable state and are accepted by it. The fruit may be and is commingled, after grading, with that of other members. The loss or destruction of the goods would fall upon the corporation that held title at the time of loss. The corporation, Local or Central Sales Agency, in whom title is vested, has an insurable interest and insures the product. The corporation, Local or Central, can pledge, borrow money, or issue warehouse receipts on the dried fruit and at times has.

When the Local turns the dried fruit over to the Central Sales Agency in a merchantable state, after the latter's acceptance, title passes from the Local to the Central. Complete payment of the purchase price is postponed, but it is fixed and the Central is subject to the Locals to account according to the contract, by-laws and statutes. The Central must render bookkeeping services for the Local. There is then a sale and a market.

By illustration, if a fire destroys all of the specific prunes of a grower after delivery to a Local or the Central, the grower suffers no loss at all, but receives his regular profits. He could not reclaim his prunes after delivery if he desires. He has no control as to how they are packed, where they are shipped, when they are sold or to whom they are sold. His only in-

terest is in the receipt of the sales price in accordance with the sales contract. He cannot hire or fire any employee or direct their work in any particular. He was as remote to the deceased Baiocchi as a New York resident owning stock in Rosenberg Bros. would be to Burger or Bettencourt. He does not know the work and cannot do the work. The grower is a stranger.

The California Prune and Apricot Growers Association is his *market.* Upon the delivery of the dried manufactured prunes to the Local in a merchantable state by rail or truck, as he is required to do under his marketing contract, his farming activities are over. A highly industrial type of commercial activity then begins in which 1500 workers participate. The grower's market has been reached. He has sold his product. Unless *this* is the grower's market, where is it? Is it the retail chain store that next receive some of his prunes in a box commingled beyond recognition with the prunes of others? To say that that is when the ordinary prune grower customarily parts with his economic interest in the future form or destiny of his prunes flies in the fact of reality. Nor can you say that that retail chain store is the terminal market for distribution for consumption since that phrase is clearly defined in the *Burger* case, 66 F. Supp. at p. 624, wherein it is said:

> " 'Delivery to a terminal market for distribution for consumption' is fixed by statute as a definitive boundary. Thus, Congress has drawn a line of demarcation across the various pathways followed by agricultural and horticultural commo-

> dities in passing from producer to consumer, and has declared that once the commodity reaches the *market, from which in ordinary course of trade it next goes into the channels of distribution for consumption*, any service afterwards performed for any person in treating or handling such commodity does not constitute 'agricultural labor' within the meaning of the Act.
> "The uncontradicted evidence presented to the Board discloses that along the producer-to-consume route of dried fruit the Fresno packing plant is a terminal market. The company packs, sells, and delivers it to wholesale and retail outlets. Burger's services were the beginning step in the Rosenberg process of preparing dried fruit for 'distribution for consumption'." (Emphasis added).

Under this definition, clearly the cooperative nonprofit corporation here involved is the "market, from which in ordinary course of trade it next goes into the channels of distribution for consumption." If so, it is a terminal market in spite of appellant's desire to ignore the Court's definition of the term. Moreover, the appellant, in addition to ignoring this Court's decisions and congressional intent, suggests on page 48 of his brief that this Court ignore the plain words of the statute and hold that there is no terminal market for distribution to consumption where there is a cooperative. Thus, by a process of administrative legislation, appellant attempts to repeal the express words of the statute, by blindly ignoring them, and overrule the judicial definition of the term terminal market as contained in the *Burger* case as quoted above and as the law of this Circuit.

POINT III.

AN INTERPRETATION EXCLUDING THE DRIED FRUIT EMPLOYEES OF COOPERATIVES AND INCLUDING THE EMPLOYEES OF A COMMERCIAL PACKER WOULD MAKE THAT SECTION OF THE ACT UNCONSTITUTIONAL.

The chief reason for excepting agricultural labor from social security coverage and other allied remedial legislation has been administrative and accounting problems. No such probelms exist in the dried fruit packing house, whether commercial or cooperative. The Central Sales Agency, in question, has a large accounting force and under its contracts renders accounting services for its member corporations. It employs as high as 1500 workers. It is a modern, efficient sales organization competing against other corporations on the open market in a highly competituve business. Moreover, there is no difficulty of collection. As a matter of fact, the money, both taxes and contributions, have been for thirteen and one-half years and are now being paid to the Treasury Department.

In this respect, the California Supreme Court in *Cal. Emp. Com. v. Butte County etc. Assn., supra,* quoting almost verbatim from *Latimer v. U. S.*, 52 F. Supp. 228 (S. D., Calif.) at p. 231, commented:

> "Second, the principal reason for exempting 'agricultural labor' from social and industrial benefits resulting from remedial legislation has been administrative difficulties and accounting inconveniences in farm work (*Carmichael v. Southern*

> *Coal and C. Co.*, 301 U. S. 495 (57 S. Ct. 868, 81 L. Ed. 1245, 109 A. L. R. 1327)), but with relation to employment in and operation and management of packing houses by respective associations, no such practical impediment exists. On the contrary, the usual economy, efficiency and skill with which such associations units, functioning as adjuncts to agricultural pursuits, are operated by boards of directors and expert business managers, complemented by systematic office service, place them on no different level than other business enterprises insofar as concerns ability to comply with administrative computation procedure under unemployment compensation insurance laws."

The corporation the Court was there discussing was incorporated under the identical statute as are the corporations, Central and Local, in the case at bar.

As was pointed out in the *Burger* case, *supra*, at p. 627, by Judge Mathes:

> "Likewise, here as the record clearly reveals the very factors which have been relied upon as constitutional justification for the 'agricultural labor' exemptions are entirely wanting. *Carmichael v. Southern Coal and Coke Co.*, 301 U. S. 495 * * *"

A fortiorari, that is the case here where the packer is a corporation fully as large as the Rosenberg Bros. corporation.

A physical distinction between the two corporations is impossible. They both perform identical services, employ the same type of labor to do the same type of work, and have large accounting and clerical staffs.

To deny Social Security benefits to the employees of one and to grant them to the employees of the other would be arbitrary, capricious, legislation and classification in derogation of due process of law guaranteed to all persons by the fifth amendment.

In this respect, counsel wishes to point to the following authorities:

Leeper v. Texas, 139 U. S. 462, Sup Ct. 277;
Giozza v. Tierman, 148 U. S. 657, 12 Sup. Ct. 721;
U. S. v. Yount, D. C., 267 Fed. 861;
Steward Machine Co. v. Davis, 301 U. S. 548, 83 L. Ed. 441;
U. S. v. Armstrong, D. C., 265 Fed. 683;
U. S. v. New York etc. Co., 165 Fed. 742;
Sims v. Rives, 66 App. C. 24, 84 Fed. 871, cert. denied, 298 U. S. 682, 56 S. Ct. 960, 80 L. Ed. 1402;
Lappin v. D. of Col., 22 App. D. C. 68.

As is stated in 11 *Am. Jr.* 96 at p. 725:

> "It is an elementary principle that when the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other it would be valid, the Court should adopt the construction that would uphold it[10]."

Cited as the leading cases in this respect are the following cases:

Chippewa Indians v. United States, 301 U. S. 358, 81 L. Ed. 1156, 57 S. Ct. 826;
Anniston Mfg. Co. v. Davis, 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816;
Crowell v. Benson, 285 U. S. 22, 76 L. Ed. 596, 52 S. Ct. 285;

United States v. La Franca, 282 U. S. 568, 75 L. Ed. 551, 51 S. Ct. 278;
Reiniche v. Northern Trust Co., 278 U. S. 339, 73 L. Ed. 410, 49 S. Ct. 123;
Hooper v. Calif., 155 U. S. 648, 39 L. Ed. 297, 15 S. Ct. 207;
United States v. Howell, 11 Wall 432, 20 L. Ed. 195
Parsons v. Bedford, 3 Pet. 433, 7 L. Ed. 732.

It is, therefore, urged that the Court construe the statute herein, broadly and liberally, as the appellee has argued.

Such a construction results in the statute being held constitutional and removes any of the "grave doubts on that score." The construction urged will bring justice, equality, and satisfaction to all of the employers and employees and harmonize the scheme of social security worked out so elaborately in this country in the last decade.

POINT IV.

THE ACT MUST BE CONSTRUED LIBERALLY AND ALL EXCEPTIONS TO ITS OPERATION MUST BE CONSTRUED STRICTLY.

That the act should be construed liberally and all exceptions to its operation must be construed strictly is settled law and requires no exhaustive citation of authority.

When the act was declared constitutional by the Supreme Court of the United States, it was on the basis that Congress was empowered to promote the

general welfare; that unemployment was a national evil and that, in the interest of the general welfare, Congress could appropriate funds to remedy the evil.

Helvering v. Davis, 301 U. S. 619, 57 S. Ct. 904; *Steward Machine Company v. Davis*, 301 U. S. 548, 57 S. Ct. 904.

The broad purpose of the legislation to remedy the evils of national unemployment shows the way at once to a liberal and broad interpretation of its coverage, purposes and intents.

The Act contained initially certain exceptions founded upon definite reasons of administrative convenience, or of sovereign supremacy, or of public interest. The fact that the classification was not arbitrary resulted in the sustaining of the exceptions against constitutional challenge. One cannot help but be impressed with the broad interpretation of the Act given in the above cited leading cases by the learned Justice Cardoza.

This broad interpretation exists today and many excellent opinions of other Judges and Justices express it.

For example, in *Grace v. Magruder*, 148 Fed. (2d) 679 at 680:

> "The . . . persons involved in this case . . . are obviously subject economically to the evils the laws were designed to combat[8], and the remedies those laws afford are appropriate for preventing or curing the evils[9]."

The Judge then quotes from Judge Parker of the Fourth Circuit Court of Appeal, at p. 681:

> "The Social Security Act . . . was enacted pursuant to a public policy unknown to the common law; and its applicability is to be judged . . . from the purposes Congress had in mind . . ."

Again speaking through Judge Major of the Seventh Circuit Court of Appeal, in *Carroll v. Social Security Board*, 128 Fed. (2d) 876 at 881, the same thought finds expression when the Court says:

> "The purpose which Congress had in mind, and the object sought to be accomplished by the enactment before us is aptly stated in *Helvering v. Davis* . . . That it should be liberally construed in favor of those seeking its benefits cannot be doubted."

Because of the above well established rule of construction, the rule which is its complement is as clearly settled; namely, the exception to the general scope of the Act is subject to strict construction and should not be extended to unduly restrict the coverage and effectiveness of the legislation.

In *Fleming v. Hawk-Eye Pearl Button Co.*, 113 Fed. (2d) 52, Judge Gardiner of the Eighth Circuit, after stating the above rule of construction quoted from the opinion in *U. S. v. Dickson*, 15 Pet. 141 at 165:

> "In the last cited case it is said: 'In short a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof'."

Judge McCormick in *Latimer v. United States*, 52 Fed. Supp. 228 at 234, phrased the rule of construction forceably as follows:

> "Therefore, a realistic approach to the social and economic security of employees in present-day large scale enterprises of all kinds requires that all doubt in construing remedial statutes providing unemployment insurance and old age protection and containing tax impositions should favor coverage rather than exemption."

The above remarks are repeated with approval in the recent and leading case of *Miller v. Burger*, No. 11,480, C. C. A. 9th, June 5, 1947, 161 Fed (2d) 992.

Judge Shaw in *Cal. E. Com. v. Black Fox Inst.*, 43 Cal. App. 2nd Supp. 868 at 872, comments:

> "It sets up a scheme for ameliorating the hardships of unemployment . . . In view of the purpose of these provisions, they should not be whittled down by narrow construction, nor should exemptions not clearly justified by their language be engrafted upon them by judicial interpretation."

The last word in this respect is to be found in the learned opinion of District Judge Mathes in *Burger v. Social Security Board*, 66 F. Supp. 619 at 626, wherein it is said:

> "It is settled that the Social Security Act should be liberally construed in favor of those seeking its benefits. All doubts of interpretation are to be resolved in favor of coverage."

It is therefore suggested that the rules of construction are established that the Social Security Act

should in common with other remedial legislation be liberally construed and that exceptions to its operation must be strictly construed.

CONCLUSION.

The services were performed after the dried fruit had reached the growers' market and the terminal market and were, therefore, in covered employment. The legislative history and the law of this Circuit point clearly to an affirmance of the decision of the lower Court reversing the Social Security Administrator. Any other interpretation would raise serious constitutional questions which, under rules of construction, are to be avoided. A liberal construction of a remedial statute requires a reversal of the appellant's ruling, as a matter of law, and approval of the District Court's decision.

Respectfully submitted,

ARTHUR L. JOHNSON,

Attorney for Appellee.

Of Counsel:

ROBERT MORGAN of

JOHNSON, MORGAN, THORNE & SPEED

APPENDIX.

APPENDIX.

HOUSE AND SENATE COMMITTEE REPORTS ON GENERAL PURPOSES AND SCOPE OF THE 1939 AMENDMENT IN QUESTION.

Pertinent excerpts other than those cited in the attached brief, of the 121-page House Report and 93-page Senate Report (H. Rept. No. 728, 76th Congress, 1st Sess., pp. 2-18; S. Rept. No. 734, 76th Congr., 1st Sess., pp. 2-19), on the 1939 Amendments to the Social Security Act (emphasis supplied throughout), are as follows:

Coverage.

1. Certain services, including services for agricultural and horticultural associations, voluntary employees' beneficiary associations, local or ritualistic services for fraternal beneficiary societies and *services of employees earning nominal amounts (less than $45.00 per quarter) of non-profit institutions exempt from income tax, are exempted* from old-age insurance and unemployment compensation *in order to eliminate cases of inconsequential tax payments.*

2. The term *"agricultural labor"* is defined so as to clarify its meaning and to extend the exemption to certain types of service which, although not at present exempt, *are an integral part of farming activities.*

3. *About* 1,100,000 *additional persons* (seaman, bank employees and employed persons age 65 and over) *are brought under the old-age in-*

surance system and about 200,000 under unemployment insurance (chiefly bank employees). (H. Rept. p. 3; S. Rept. p. 2).

History of Legislation.

The Social Security Act became law on August 14, 1935. The Bill was passed by an *overwhelming majority* in both the House and the Senate, the votes being 372 to 33 and 77 to 6, respectively. The insurance provisions of the Act (substantially as reported out by this Committee, were upheld by the United States Supreme Court in the cases of *Steward Machine Co. v. Davis* (301 U.S. 548); *Helvering v. Davis* (301 U.S. 619); and *Carmichael v. Southern Coal Co.* (301 U.S. 495).

The enactment of the Social Security Act marked a new era, the Federal Government accepting, for the first time, responsibility for providing a systematic program of protection against economic and social hazards. Though admittedly not perfect or all inclusive, the Social Security Act *did embrace the broadest program for social security ever launched at one time by any Government.* (H. Rept. p. 3, S. Rept. p. 3). * * *

The Committee held extended public hearings on these recommendations and alternative proposals relating to social security, including more than 90 bills introduced in the House. These hearings lasted from February 1 to April 7, dur-

ing which period the Committee sat 48 days and took 2500 pages of testimony. Among the 164 individuals who testified in person there were 3 Senators, 41 Congressmen, 14 Government Officials (Federal and State), 21 labor representatives, 27 employer representatives, 16 economists, and 42 others, representing themselves or various organized groups of citizens. Many of these witnesses filed supplementary statements for the record. Some twenty or thirty other statements from individuals unable to appear were also placed in the record.

Since the conclusion of the public hearings these various proposals have received the constant attention of the Committee. Executive sessions have been held over a period of 6 weeks. The Committee has realized the importance of this subject and has taken seriously its responsibility to recommend to Congress the best possible legislation for *supplementing and improving* our system of social security. The Committee therefore recommends immediate enactment of this Bill. (H. Rept. p. 5; S. Rept. p. 5).

General Purposes and Scope of Amendments.

The present Bill aims to *strengthen and extend* the *principles and objectives* of the Social Security Act. *The foundations of a permanent program have been laid and it seems wise to build upon the present structure.*

Old-age insurance, unemployment compensa-

tion, and public assistance are now accepted as *permanent* in our fabric of social services. The present Bill *is designed to widen the scope and improve the adequacy and administration of these programs without altering their essential features. Benefits will continue to be payable as a matter of right to workers covered by the insurance programs;* aid will continue to be related to need under the assistance programs. (H. Rept. p. 5; S. Rept. p. 5).

Federal Old-Age Assistance and Survivor Insurance Benefits.

The number of aged persons in our population is steadily growing. In 1900 there were only 3,080,000 persons 65 and over, representing 4.1 percent of the population. This figure reached 6,634,000 or 5.4 percent in 1930, and it is estimated there are about 8,200,000, or 6.3 percent at the present time. Recent estimates indicate that by 1980 we may have over 22,000,000 persons 65 and over, representing 14 to 16 percent of the total population. Recognizing these facts, it is possible to foresee that we shall have a *growing number of aged persons for whom some provision must be made. This has been the experience of all industrial countries.*

In the course of its study of the problem, the Committee has become *increasingly impressed* by the *need to revise the structure of benefits more closely to the basic needs of our people,* now and

in the future. With limited funds available for this type of insurance protection, individual savings and other resources must continue to be the chief reliance for security. *As a means of affording basis protection,* however, the existing system can be much *improved.* With the advantage of more than three years of study and experience since the passage of the Act and with a greatly enhanced public understanding of the method of social insurance, *the time seems ripe for the revision of the program to afford more adequate protection to more of our people.* (H. Rept. p. 6; S. Rept. p. 6).

Old-age insurance is designed to prevent future old-age dependency; old-age assistance is designed to relieve existing needs. A contributory system of old-age insurance keeps the cost of old-age benefits from becoming excessive and assures support for the aged as an earned right. *If the contributory system is strengthened and liberalized,* the cost of old-age assistance for uncovered groups will not increase so rapidly in future years when the proportion of aged in the population will be higher than at present.

It is essential then that the contributory basis of our old-age insurance system be STRENGTHENED and NOT WEAKENED. Contributory insurance is the best-known method of preventing dependency in old age by enabling wage earners

to provide during their working years for their support after their retirement. By relating benefits to contributions or earnings, contributory old-age insurance preserves individual thrift and incentive, by granting benefits as a matter of right it preserves individual dignity. *Contributory insurance therefore strengthens democratic principles and avoids paternalistic methods of providing old-age security.* Moreover, a contributory basis facilitates the financing of a social insurance scheme and is a safeguard against excessive liberalization of benefits *as well as a protection against reduction of benefits.*

The contributory method in social insurance is no innovation. It had its beginning several hundred years ago in several countries when small groups of workmen banded together in mutual benefit societies to build up protection against unforseen contingencies. These early friendly societies developed the insurance method of protection which, by a gradual process of evolution, led to modern social insurance, with the Government entering to strengthen cooperative thrift and mutual protection. *The contributory method of social insurance has stood the test of time and experience. Proof of this is the fact that no country which has once adopted a system of contributory social insurance has ever abandoned it.* Many foreign countries, as well as the United States, supplement their contri-

butory scheme with a noncontributory pension scheme based on individual need, *but no country has ever given up the former system in favor of the latter.* (H. Rept. p. 6; S. Rept. p. 6) * * *

Coverage.

Four years ago, when the old-age insurance program was being planned, it was expected that the Act as passed would provide old-age security for about half of the gainful workers in the country. * * *

The most important excluded groups are agricultural labor, domestic service, and certain nonprofit organizations; here the Committee decided unanimously that it would be unwise to remove the exemptions from these three groups at the present time. The present Bill does, however, extend old-age insurance coverage to some 1,100,000 more workers by removing the exemption of maritime employment, wage-earners after 65 and certain Federal instrumentalities such as National Banks and State banks which are members of the Federal Reserve Systems.

In order to eliminate the nuisance of inconsequential tax payments the Bill excludes certain services performed for fraternal benefit societies and other nonprofit institutions exempt from income tax, and certain other groups. While earnings of a substantial number of persons are excluded by this recommendation, *the total*

amount of earnings is undoubtedly very small. No estimate is available of the number of persons or amount of earnings so excluded. *The intent of the Amendment* is to exclude those persons and those organizations in which the employment is part-time or intermittent *and the total amount of earnings is only nominal, and the payment of the tax is inconsequential and a nuisance. The benefit rights built up are also inconsequential. Many of those affected,* such as students and secretaries of lodges, *will have other employment which will enable them to develop insurance benefits.* This Amendment, therefore, should simplify the administration for the worker, the employer and the Government. (H. Rept. p. 18; S. Rept. p. 19).

SECTION OF STATUTE RE COOPERATIVES.

Title II, Section 209 (b) of the Social Security Act, as amended in 1939 (42 U. S. C. 409, 53 Stat. 1373), reads in pertinent part as follows:

Definitions.

(b) The term "employment" means any service . . . , except—

(10) (A) Service performed in any calendar quarter in the employ of any organization exempt from income tax under Section 101 of the Internal Reveune Code, if—

(1) the remuneration for such services does not exceed $45.00 . . .

(B) Service performed in the employ of an agricultural or horticultural organization exempt from income tax under Section 101 (1) of the Internal Revenue Code . . .

PERTINENT EXCERPTS FROM CONGRESSIONAL RECORD.

The Congressional Record of June 8, 1939, Vol. 84, Part 6, sets forth the consideration of H. R. 6635 on the Floor of the House, insofar as the "agricultural labor" definition is concerned, as follows: (Emphasis added throughout).

Page 6864:

(During consideration by Committee of the Whole House on the State of the Union).

Mr. Buck. I want now to take up the Amendment that the Committee has prepared defining agricultural labor . . .

The exemption contained in the original Act is justified and should be continued. The clarifying paragraphs that the Ways and Means Committee has put into this Bill are merely for the purpose of interpreting the original decision of Congress that agricultrual labor should be exempt. *These paragraphs are based on the theory that what is agricultural work is determined by the nature of the work and not by whom the man is employed. Agricultural work starts with the planting of the crop. It ENDS when that crop has been DELIVERED TO MARKET or to a carrier*

for transportation to market, and all intervening steps should be regarded in the nature of agricultural labor . . .

Mr. Buck. I cannot tell the gentleman that, I will say this much, *that in the opinion of those of us who helped draw this Amendment these various services WHICH FORM AN INTEGRAL PART OF AGRICULTURE* were intended to be covered by Congress in its original enactment; but, frankly, I cannot tell the gentleman what the situation would be in regard to the problem here . . .

Mr. Buck. I am sorry. I cannot yield further on this fur-bearing proposition. I wish to call attention to one or two other matters before my time expires.

Let me call attention to another serious anomaly. If you are the owner of a farm, and you enter into a written agreement with a marketing agent to pick up and pack your crop whether it is fruit or beans or anything else, the labor employed by the marketing agent is considered to be agricultural labor at the present time; *but if you sell your fruit or beans to that same marketing agent and he comes in with a crew and picks your crop, that is not agricultural labor under the rulings of the Bureau of Internal Revenue.* Services performed by the employees of a company handling tobacco in warehouses off the farm but in the immediate neighborhood where the

process of fermentation was carried on, however, have been held to be agricultural, so that the Treasury has applied no uniform rule in connection with its idea of limiting agricultural labor to work on the farm. In the case of cotton ginning, packing lettuce, and so forth, however, a very rigid restriction has been made limiting the exemption to work done on a farm itself.

(Here the gavel fell.)

Mr. Cooper. Mr. Chairman, I yield five additional minutes to the gentleman from California.

Mr. Buck. These curious distinctions produce inequities among people operating in the same commodities in the same localities, and certainly this is an injustice. Now, assuming there is merit to what I said about the reason for the exemption of agricultural labor until such time as both employer and employee have been educated to the point where they will want to be included—and after all, you want these people to be included just as you have wanted the seamen who have come to us asking to be included under this Act—then we ought to have this clarifying Amendment *which is based on the theory that it is not by whom a man is employed but the nature of the work he is doing that constitutes agricultural labor* * * *.

Page 6867 (June 8, 1939):

Mr. Treadway. Mr. Chairman, I make the point of order that there is no quorum present.

The Chairman. Sixty-four Members present. Not a quorum.

When 312 Members responded to their names the Committee resumed its sitting * * *.

FEDERAL GOVERNMENT RULINGS

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

WASHINGTON, D. C.

ARTHUR J. ALTMEYER, CHAIRMAN
ELLEN E. WOODWARD
GEORGE R. BIGGE

February 16, 1945

Mr. Arthur L. Johnson
202 Porter Building
Second and Santa Clara Streets
San Jose 20, California

Dear Mr. Johnson:

I have your letters of January 23 and January 26, 1945 urging coverage under the social security program of dried fruit and raisin packinghouse workers. As you indicate, the definition of "agricultrual labor" written into the Social Security Act in 1939 has been exceedingly difficult to interpret. The Bureau of Internal Revenue and the Bureau of Old-Age and Survivors Insurance have experienced particular difficulty in agreeing upon what activities are "incident to the preparation of fruits and vegetables for market" so as to constitute "agricultural labor." The Bureau of Internal Revenue, however, has held generally that these preparatory or processing services in the dried fruit

industry are excepted from coverage. The Social Security Board has not yet reached a final decision. As you know, the taxing and benefit provisions are separate and each agency must reach its own decision. Until a decision is reached by the Social Security Board, action on claims for benefits based on such employment is being held in abeyance.

The Board fully agrees that dried-fruit workers, as well as other workers who have similar commercial and industrial characteristics, should be covered. Insofar as it would remove all possible doubt that dried-fruit workers are covered, the Board is in sympathy with the objective of the bills introduced by Congressman Anderson at the last and present sessions of Congress, and with the changes suggested in your first letter.

The Board would prefer, however, that all agricultural labor be brought under the Act and that the artificial line that now separates agricultural and nonagricultural workers, so far as the social security program is concerned, be removed. Recommendations to this effect have been made by the Board to Congress. As you are aware, the Wagner-Murray-Dingell Bill introduced in the last Congress, and the bill recently introduced by Congressman Dingell in this session both provide for the extension of coverage to agricultural workers.

Mr. Arthur L. Johnson—2/16/45

While the question of retroactive coverage is not pres-

ently involved since it is by no means certain that dried-fruit workers are now excluded, these workers would be handicapped should the final interpretation of the present law exclude them. As coverage is extended, appropriate modifications should certainly be made in the program in order to overcome the handicaps of previously excluded groups.

We are very glad to learn your views and thank you for your continuing interest in the development of the social security program.

Sincerely yours,

A. J. ALTMEYER,
Chairman.

United States Senate

COMMITTEE ON BANKING AND CURRENCY

ROBERT F. WAGNER, N. Y., CHAIRMAN

CARTER GLASS, VA.	CHARLES W. TOBEY, N. M.
ALBEN W. BARKLEY, KY.	JOHN A. DANAHER, CONN.
JOHN M. BANKHEAD, ALA.	ROBERT A. TAFT, OHIO
FRANCIS MALONEY, CONN.	JOHN THOMAS, IDAHO
GEORGE L. RADCLIFF, MD.	HUGH BUTLER, NEBR.
D. WORTH CLARK, IDAHO	ARTHUR CAPPER, KANS.
SHERIDAN DOWNEY, CALIF.	C. DOUGLASS BUCK, DEL.
ABE MURDOCK, UTAH	ALBERT W. HAWKES, N. J.
BURNET R. MAYBANK, S. C.	
JAMES G. SCRUGHAM, NEV.	
JOHN L. McCLELLAN, ARK.	

DAVID DELMAN, CLERK

March 20, 1945

Mr. Arthur L. Johnson
202 Porter Bldg.
2nd and Santa Clara Streets
San Jose 20, California.

Dear Mr. Johnson:

Thank you for sending me copies of your letters of

January 23 and January 26 to Dr. Altmeyer. I regret the delay in replying to your letters, but the pressure of my duties in the Senate and as Chairman of the Senate Banking and Currency Committee has made it impossible for me to keep my correspondence current.

I read your letters with great interest, have discussed the matter with Mr. Altmeyer and I concur in the views which he set forth in the letter he wrote you on February 16.

With all best regards, I am

Very sincerely yours,
ROBERT WAGNER

97

FEDERAL RULINGS AFFECTING SUBCHAPTERS A AND C, CHAPTER 9, OF THE INTERNAL REVENUE CODE.

487-S. S. T. 405

SECTION 1426: Defiinitions. 1940-46-10487
REGULATIONS 106, SECTION 402.208: Agricultural labor. S.S.T. 405
(Also Subchapter C (Federal Unemployment Tax Act), Section 1607; Regulations 107, Section 403.208.)

Status of various types of services rendered by employees of a cooperative association of fruit and vegetable growers for purposes of Subchap-

ters A and C, Chapter 9, of the Internal Revenue Code, as amended by the Social Security Act Amendments of 1939.

Advice is requested whether various types of services rendered by employees of the M Association, a cooperative organization of fruit and vegetable growers, are excepted from "employment" as "agricultural labor" for purposes of Subchapters A and C, Chapter 9, of the Internal Revenue Code, as amended by the Social Security Act Amendments of 1939.

The association supervises the activities of its members and performs services from the beginning of the growing period until the products are on their way to market. It employs inspectors who advise the growers with respect to production methods, obtain crop estimates from time to time for financing purposes, and during the packing and processing season supervise the grading and packing of the products and check the condition of those in storage. It aids the growers in financing the growing, harvesting, and processing of their products, purchases materials and supplies, and stores them until needed by the growers, at which time they are distributed to the growers by truck.

The association manufactures spray materials which it sells exclusively to its members at cost. It also manufactures cider and vinegar from apples raised exclusively by its members. It packs apples, pears, cherries, potatoes, and other fruits and vegetables, all of which are raised by its members. The

association operates a cannery in which it handles only fruits and vegetables produced by its members, and a cold storage warehouse in which its members' products are held for market after they are processed and packed. Ice is manufactured for freight cars carrying the products to market and some electricity is generated for use in the above-mentioned plants. A reservoir and pipe line owned and operated by the association furnish water for power and other purposes in its plants. The association sells a small amount of ice and furnishes some water to a railroad company for the latter's engines. The net returns from these operations aid in reducing the cost of the above-mentioned services to the members of the association. The association employs, among others, department managers, sales promotion men, accountants, clerical workers, and maintenance men.

12-1093
12-1094
CASE NO. 12-1095
EXHIBIT P

—2—

98

Upon the basis of the facts presented and in view of the provisions of Sections 1426 (h) and 1607 (1) of the Code, as amended, it is held that services performed by employees of the M Association in connection with the cultivation of the soil and the raising and harvesting of products on the farms of its members, and in packing, packaging, processing, grading,

storing (including the actual operation of packing and cold storage equipment but not canning equipment), and delivering to storage or to market, or to a carrier for transportation to market, the fruits and vegetables produced by its members, together with services rendered by officers and other employees of th association in the direct supervision of such services, constitute "agricultural labor" for purposes of Subchapters A and C, Chapter 9, of the Code, as amended.

It is also held that services performed by employees of the M Association in connection with the canning of the products of its members, the manufacture of spray materials, cider, vinegar, and ice, the generation of electricity, the operation of the reservoir and pipe lines under the circumstances stated, the inspection of members' crops, the furnishing of advice to members, the promotion of sales, the repair of the plants and equipment, and clerical work, together with the supervision of such services, constitute "employment" for purposes of such subchapters.

12-1093
12-1094
CASE NO. 12-1095
EXHIBIT P

FEDERAL RULINGS AFFECTING THE SOCIAL SECURITY ACT

8-S.S.T. 10

SECTION 907: Definitions. XV-27-8157

REGULATIONS 90, ARTICLE 206 (1): S.S.T. 10

Agricultural labor.

> Where services are performed by employees of an association of producers in connection with the processing, packing, packaging, transportation, or marketing of farm products, such services do not constitute "agricultural labor" within the meaning of section 907 (c) of the Social Security Act even though the products in connection with which the services are performed were produced by the members of the association.

A ruling is requested whether services performed by individuals engaged as employees in packing fruit constitute "agricultural labor" within the meaning of section 907 (c), Title IX, of the Social Security Act, which defines the term "employment" and excludes "agriculture labor" therefrom.

Article 206 (1) of Regulations 90, promulgated under Title IX of the Social Security Act, defines "agricultural labor" as used in section 907 (c) of the Act as follows:

* * * AGRICULTURAL LABOR.—The term "agricultural labor" includes all services performed—

(a) By an employee, on a farm, in connection with the cultivation of the soil, the harvesting of crops, or

the raising, feeding, or management of livestock, bees, and poultry; or

(b) By an employee in connection with the processing of articles from materials which were produced on a farm; also the packing, packaging, transportation, or marketing of those materials or articles. Such services do not constitute "agricultural labor," however, unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced, and unless such processing, packing, packaging, transportation, or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations.

As used herein the term "farm" embraces the farm in the ordinarily accepted sense, and includes stock, dairy, poultry, fruit, and truck farms, plantations, ranches, ranges and orchards.

Forestry and lumbering are not included within the exception.

Wide variations in the method of preparing farm products for market and in the methods of marketing are followed throughout the various States, and wide variations exist in the methods of operation as between the producers of farm products and cooperative organizations of farmers in some instances and between individual farmers and commercial packers and processors in other instances. Agricultural products are often delivered by the actual producer directly to a commercial enterprise in which the producer

has no other interest other than the fact that the enterprise is a purchaser of his products. In other instances the products of the farm are delivered by the producer to a cooperative organization of farmers, of

12-1093
12-1094
CASE NO. 12-1095
EXHIBIT Q
100

—2—

which such producer is a member, and the products are prepared and/or processed in widely varying degrees and marketed on a commercial basis by the cooperative organization, or returned to the producer to be marketed by him in his own way.

The fact that an individual is engaged in handling farm products does not of itself make the services performed by him "agricultural." Services are often performed by employees in connection with the packing, processing, and other preparation of farm products for sale to consumers which are not a part of ordinary farming operations but a part of commercial or manufacturing operations.

It is the opinion of the Bureau that services performed by an employee in connection with the processing, packing, packaging, transportation, or marketing of farm products constitute "agricultural labor" within the meaning of section 907 (c) of the Social Security Act only when those services are performed by an employee of the owner or tenant of the partic-

ular farm on which the product in its raw or natural state was produced. Where such services are performed by individuals who are employed by an association of producers, even though the products in connection with which the services are performed were produced by members of the association, the services of such employees are not excepted under section 907 (c) of the Social Security Act as "agricultural labor," since the individuals are employees of the association and not of a particular producer.

12-1093
12-1094
CASE NO. 12-1095
EXHIBIT Q

102

FEDERAL SECURITY AGENCY
Social Security Administration
Office of Appeals Council
DECISION OF APPEALS COUNCIL

In the case of	Case No.
Edgar T. Penn	12-139
(Claimant)	CLAIM FOR
Edgar T. Penn	Primary Insurance Benefits.
(Wage Earner)	
554-03-8307	
(Social Security Account No.)	

This case is before the Appeals Council on request of the claimant for review of the decision of John L.

Landfair, Referee, rendered on February 6, 1946. The referee's decision sets forth the applicable provisions of the Social Security Act, as amended, and no purpose would be served by restatement here. The referee's statement of facts setting forth the conditions and circumstances in the instant case is herewith incorporated by reference.

The Bureau of Old-Age and Survivors Insurance of the Social Security Board (Administration) and the referee, respectively, determined that the services of the claimant as a processor of dried fruit for the California Prune and Apricot Growers Association, a cooperative of San Jose, California, subsequent to December 31, 1939, were exempted as "agricultural labor" by section 209 (1) (4) of the Social Security Act, as amended, and hence, the remuneration received for such services could not be included in the computation of the amount of the claimant's primary insurance benefit.

The referee reached the conclusion that the services of the claimant for the cooperative were rendered prior to the receipt of the produce at a "terminal market" as that term is used in section 209 (1) (4) of the Social Security Act, as amended.

The claimant contends that his services for the cooperative were rendered subsequent to the arrival of the produce at a "terminal market." The issue before us, then, is whether or not the delivery by or for a grower to a cooperative is a delivery to a "terminal market for distribution for consumption" within the

meaning of section 209 (1) (4) of the amended Act.

12-1093
12-1094
CASE NO. 12-1095
EXHIBIT R
103

The determination of the referee was in accord with the then interpretation of section 209 (1) (4) adopted by the Social Security Board (Administration) at the time of the issuance of the referee's decision. Subsequent to the decision of the referee, the Social Security Administration has changed its interpretative position in respect to section 209 (1) (4) of the amended Act. This change of position is based upon the decision of the United States Cricuit Court of Appeals for the Ninth Circuit in affirming on June 5, 1947, the decision of California, Northern Division in the case of *James and Maude Burger vs. Social Security Board.* While the Burger case involved a privately owned corporation instead of a cooperative association such as the one for which the claimant worked it appears clear from the Circuit Court's decision that insofar as section 209 (1) (4) is concerned, services for a cooperative association are to be treated the same as services for a privately owned corporation. The decision of the circuit court refers to the principle expressed by it in *North Whittier Citrus Association* (a cooperative association) *vs. National Labor Relations Board* (109 F. (2d) 76). It was the view of the court in the North Whittier Heights case

that when the product of the soil leaves the farmer, as such, and enters a factory for processing and marketing *it has entered upon the status of industry . . .*"

In the Burger case the term "terminal market' is interpreted by the court to mean the "growers market" i. e., the "market" to which the grower delivers for sale or other disposition his products in the form and at the stage of processing in which such produce is normally or customarily disposed of by the ordinary grower. Applying this interpretation to the term "terminal market" it is abundantly clear, and the Appeals Council finds that the services rendered by the claimant as a dried fruit processor subsequent to December 31, 1939 for the California Prune and Apricot Growers Association, a cooperative, were rendered subsequent to the receipt of the produce at a "terminal market for distribution for consumption."

The Appeals Council further finds that the services so rendered by the claimant were in "employment," and the remuneration received for such services is "wages" under section 209 of the Act, as amended.

It is the decision of the Appeals Council that the wage record of Edgar T. Penn, claimant herein, be revised to effect such additional wage credits and the amount of his primary insurance benefits be recomputed on the basis of such additional wage credits. The decision of the referee is reversed.

OFFICE OF APPEALS COUNCIL

Joseph E. McElvain

Joseph E. McElvain, Chairman

Date: July 15, 1947

12-1093
12-1094
CASE NO. 12-1095
EXHIBIT R

105

FEDERAL SECURITY AGENCY
Social Security Administration
Office of Appeals Council
DECISION OF APPEALS COUNCIL

In the case of	Case No.
Marguerite K. Grimley	12-92
(Claimant)	CLAIM FOR
Marguerite K. Grimley	Primary Insurance Benefits
(Wage Earner)	
554-03-7972	
(Social Security Account No.)	

This case is before the Appeals Council on request of the claimant for review of the decision of John L. Landfair, Referee, rendered on February 6, 1946. The referee's decision sets forth the applicable provisions of the Social Security Act, as amended, and no purpose would be served by restatement here. The referee's statement of facts setting forth the conditions and circumstances in the instant case is herewith incorporated by reference.

The Bureau of Old-Age and Survivors Insurance of the Social Security Board (Administration) and

the referee, respectively, determined that the services of the claimant as a processor of dried fruit for the California Prune and Apricot Growers Association, a cooperative, of San Jose, California, subsequent to December 31, 1939, were excepted as "agricultural labor" by section 209 (1) (4) of the Social Security Act, as amended, and hence, the remuneration received for such services could not be credited to the Social Security Wage Account of the claimant. As a consequence of the exclusion of such services, the referee found that the claimant had but 7 of a required 8 quarters of coverage to be a "fully insured" individual (section 209 (g) of the amended Act) and, hence, not entitled to the primary insurance benefit for which she made application on May 27, 1941.

The referee reached the conclusion that the services of the claimant for the cooperative were rendered prior to the receipt of the produce at a "terminal market" as that term is used in section 209 (1) (4) of the Social Security Act, as amended.

The claimant contends that her services for the cooperative were rendered subsequent to the arrival of the produce at a "terminal market." The issue before us, then, is whether or not the delivery by or for a

to the primary insurance benefits for which she applied. The decision of the referee is reversed.

OFFICE OF APPEALS COUNCIL

Joseph E. McElvain

Joseph E. McElvain, Chairman

Date: July 16, 1947

12-1093
12-1094
12-1094
CASE NO. 12-1095
EXHIBIT S

Whittier Heights case that "when the product of the soil leaves the farmer, as such, and enters a factory for processing and marketing *it has entered upon the status of industry . . .*"

In the Burger case the term "terminal market" is interpreted by the court to mean the growers market" i.e., the "market" to which the grower delivers for sale or other disposition his products in the form and at the stage of processing in which such produce is normally or customarily disposed of by the ordinary grower. Applying this interpretation to the term "terminal market" it is abundantly clear, and the Appeals Council finds that the services rendered by the claimant as a dried fruit processor subsequent to December 31, 1939, for the California Prune and Apricot Growers Association, a cooperative, were rendered subsequent to the receipt of the produce at a "terminal market for distribution for consumption."

The Appeals Council further finds that the services so rendered by the claimant were in "employment," and the remuneration received for such services is "wages" under section 209 of the Act, as amended, and as a consequence entitles the claimant to three additional quarters of coverage.

It is the decision of the Appeals Council that Marguerite K. Grimley, claimant herein, was a fully insured individual at the time she made application for primary insurance benefits, and is therefore entitled

to the primary insurance benefits for which she applied. The decision of the referee is reversed.

OFFICE OF APPEALS COUNCIL

Joseph E. McElvain

Joseph E. McElvain, Chairman

Date: July 16, 1947

12-1093
12-1094
12-1094
CASE NO. 12-1095
EXHIBIT S